A

VIRAN NAGAPAN v. DEEPA SUBRAMANIAM

COURT OF APPEAL, PUTRAJAYA
ABDUL AZIZ ABDUL RAHIM JCA
TENGKU MAIMUN TUAN MAT JCA
AHMADI ASNAWI JCA
B [CIVIL APPEAL NO: N-02-801-05-2014]
17 DECEMBER 2014

C ***CONSTITUTIONAL LAW:*** *Courts – Jurisdiction – Conflict of jurisdiction between civil and Syariah Court – Petition for dissolution of marriage and order for custody of children – Syariah Court dissolved marriage and granted order for custody of children – Whether Syariah Court has jurisdiction to hear and determine matters arising from marriage registered and solemnised under Law Reform (Marriage and Divorce) Act 1976 – Federal Constitution, art. 121(1A)*

D ***CIVIL PROCEDURE:*** *Jurisdiction – High Court – Parties married under Law Reform (Marriage and Divorce) Act 1976 – Husband converted to Islam and applied for dissolution of marriage and custody of children to Syariah Court – Whether Syariah Court has jurisdiction to hear and determine matters relating to non-Muslim marriages – Whether civil court has jurisdiction when one party in marriage converted to Islam – Federal Constitution, art. 3*

E ***FAMILY LAW:*** *Divorce – Jurisdiction of court to hear petition – Dissolution of marriage and custody of children – Parties married under Law Reform (Marriage and Divorce) Act 1976 – Husband converted to Islam and applied for dissolution of marriage and custody of children at Syariah Court – Syariah Court dissolved marriage and granted custody to husband – Whether orders granted by Syariah Court valid*

F ***FAMILY LAW:*** *Custody – Jurisdiction – Husband converted to Islam and applied for dissolution of marriage and custody of children at Syariah Court – Syariah Court dissolved marriage and granted custody to husband – Whether civil court could set aside orders granted by Syariah Court – Whether civil court has jurisdiction when one party in marriage converted to Islam – Whether civil court could grant custody order of children by relying on s. 51(2) of Law Reform (Marriage and Divorce) Act 1976 – Whether civil court deprived by Guardianship of Infant Act 1961 to hear matter when parties are Muslims*

G

H The appellant husband ('the appellant') and the respondent wife ('the respondent') were married in 2003 under the Law Reform (Marriage and Divorce) Act 1976 ('the LRA') and had two children. When the appellant converted to Islam in 2012, he registered his conversion and of the two children. The appellant then obtained an order from the Syariah High Court
I ('Syariah Court') pursuant to s. 46(2) of the Islamic Family Law (Negeri Sembilan) Enactment 2003 ('Enactment 2003') dissolving his civil marriage

to the respondent and a temporary custody order over the children. In turn, the respondent proceeded to petition for the dissolution of the marriage and sought custody of her two children in the civil High Court ('the High Court'). The High Court granted the application. Hence, the present appeal. The issues that arose for the court's determination were (i) whether the High Court had jurisdiction to grant the dissolution of the civil marriage between the appellant and the respondent; (ii) whether the High Court is deprived by s. 1(3) of the Guardianship of Infant Act 1961 ('the Act') to hear guardianship and custody matters when the subject matter and the parties are Muslims; and (iii) whether, after reading s. 3(3) of the LRA together with s. 1(3) of the Act in the context of art. 3 of the Federal Constitution ('the Constitution') that Islam being the religion of the Federation, the High Court could grant custody order of the children to the respondent by relying on s. 51(2) of the LRA.

Held (dismissing appeal)

Per Abdul Aziz Abdul Rahim JCA delivering the judgment of the court:

(1) The Syariah Court had no jurisdiction to grant the dissolution of the civil marriage between the appellant and the respondent. Section 45 of the Enactment 2003 provides that Syariah Court can only grant orders pertaining to divorce or allow the pronouncement of the *talaq* by the husband where the marriage is registered or deemed to be registered under the Enactment or that the marriage was solemnised in accordance with Syariah law. The civil marriage between the appellant and the respondent was neither solemnised in accordance with Syariah law nor registered under the Enactment 2003. It was a marriage that was solemnised and registered under the LRA. (para 9)

(2) The provisions of the Act do not apply to Muslims in Negeri Sembilan. There was no evidence to show that the Legislature of the State of Negeri Sembilan had passed any law to adopt the application of the Act. (para 16)

(3) The argument of art. 3(1) of the Constitution was used to contend that Parliament had no power to enact s. 51 of the LRA because it compels the application by the civil courts to a Muslim of the civil law in matrimonial cases. The court was unable to see how the fact that Islam is the religion of the Federation prohibits Parliament from passing a law to ensure that where a spouse in a non-Muslim marriage is consequently dissolved, he or she remains bound to the obligation under the legal regime governing a non-Muslim marriage, that he or she undertook to the other spouse, as regards himself or herself and the children of the marriage, when he or she entered into the non-Muslim marriage. The court was unable to see how the fact that Islam is the religion of the Federation can operate to prevent a measure to ensure that the

non-converting spouse is not frustrated in his or her expectations flowing from those obligations (*Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals*; foll). (para 21)

Bahasa Malaysia *Translation Of Headnotes*

Perayu suami ('perayu') dan responden isteri ('responden') telah berkahwin pada tahun 2003 di bawah Akta Membaharui Undang-undang (Perkahwinan dan Penceraian) 1976 ('LRA') dan telah memperolehi dua orang anak. Apabila perayu memeluk agama Islam pada tahun 2012, dia telah mendaftarkan penukaran agamanya dan juga dua orang anaknya. Perayu kemudiannya mendapatkan perintah daripada Mahkamah Tinggi Syariah ('Mahkamah Syariah') di bawah s. 46(2) Enakmen Keluarga Islam (Negeri Sembilan) 2003 ('Enakmen 2003') yang membubarkan perkahwinan sivilnya dengan responden dan perintah jagaan sementara anak-anak tersebut. Seterusnya, responden memohon petisyen bagi pembubaran perkahwinan dan memohon jagaan kedua-dua anaknya di Mahkamah Tinggi sivil ('Mahkamah Tinggi'). Mahkamah Tinggi membenarkan permohonan tersebut. Oleh itu, rayuan ini. Isu-isu yang berbangkit bagi pemutusan mahkamah adalah (i) sama ada Mahkamah Tinggi mempunyai bidang kuasa untuk membenarkan pembubaran perkahwinan sivil antara perayu dan responden; (ii) sama ada Mahkamah Tinggi terhalang oleh s. 1(3) Akta Penjagaan Kanak-kanak 1961 ('Akta') daripada membicarakan hal-hal perkara penjagaan dan jagaan apabila hal perkara dan pihak-pihak adalah Muslim; dan (iii) sama ada, selepas membaca s. 3(3) LRA bersama-sama dengan s. 1(3) Akta dalam konteks per. 3 Perlembagaan Persekutuan ('Perlembagaan') bahawa Islam adalah agama Persekutuan, Mahkamah Tinggi boleh memberikan perintah jagaan anak-anak tersebut kepada responden dengan bersandarkan pada s. 51(2) LRA.

Diputuskan (menolak rayuan)
Oleh Abdul Aziz Abdul Rahim HMR menyampaikan penghakiman mahkamah:

(1) Mahkamah Syariah tidak mempunyai bidang kuasa untuk membenarkan pembubaran perkahwinan sivil antara perayu dan responden. Seksyen 45 Enakmen 2003 memperuntukkan bahawa Mahkamah Syariah hanya boleh membenarkan perintah-perintah berkenaan penceraian atau membenarkan pengisytiharan talak oleh suami apabila perkahwinan itu didaftarkan atau dianggap telah didaftarkan di bawah Enakmen tersebut atau bahawa perkahwinan tersebut telah diupacarakan selaras dengan undang-undang Syariah. Perkahwinan sivil antara perayu dan responden tidak diupacarakan selaras dengan undang-undang Syariah mahupun didaftarkan di bawah Enakmen 2003. Ia adalah perkahwinan yang telah diupacarakan dan didaftarkan di bawah LRA.

(2) Peruntukan-peruntukan Akta tidak terpakai kepada Muslim-Muslim di Negeri Sembilan. Tiada keterangan yang menunjukkan bahawa Badan Perundangan Negeri bagi Negeri Sembilan telah meluluskan sebarang undang-undang untuk mengguna pakai pemakaian Akta.

(3) Hujahan per. 3(1) Perlembagaan digunakan untuk menghujahkan bahawa Parlimen tidak mempunyai kuasa untuk menggubal s. 51 LRA kerana ia memaksa pemakaian undang-undang sivil oleh mahkamah sivil ke atas seorang Muslim dalam kes-kes perkahwinan. Mahkamah tidak dapat melihat bagaimana fakta bahawa Islam sebagai agama Persekutuan melarang Parlimen daripada meluluskan satu undang-undang untuk memastikan bahawa di mana satu pasangan dalam perkahwinan bukan Muslim telah dibubarkan, dia kekal terikat dengan kewajipan di bawah rejim undang-undang yang mentadbir satu perkahwinan bukan Islam, bahawa dia melaksanakan ke atas pasangannya, bagi dirinya dan anak-anak hasil daripada perkahwinan, sebagaimana dia memasuki perkahwinan bukan Islam. Mahkamah tidak dapat melihat bagaimana fakta bahawa Islam adalah agama Persekutuan boleh beroperasi dengan cara menghalang langkah untuk memastikan pasangan yang tidak menukar agama tidak dikecewakan jangkaannya yang wujud hasil daripada kewajipan-kewajipan tersebut (*Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals*; diikuti).

Case(s) referred to:

Che Omar Che Soh v. PP [And Wan Jalil Wan Abdul Rahman & Anor v. PP] [1988] 1 LNS 150 SC ***(foll)***

Mamat Daud & Ors v. The Government of Malaysia [1988] 1 CLJ 11; [1988] 1 CLJ (Rep) 197 SC ***(refd)***

Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah [2004] 1 CLJ 505 HC ***(refd)***

Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals [2008] 2 CLJ 1 FC ***(foll)***

Legislation referred to:

Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, s. 61(3)(b)

Federal Constitution, arts. 3(1), 8, 12(4), 121(1A)

Guardianship of Infants Act 1961, s. 1(3)

Islamic Family Law (Negeri Sembilan) Enactment 2003, ss. 45, 46(2)

Law Reform (Marriage and Divorce) Act 1976, ss. 3(3), 8, 51(2)

For the appellant - Haniff Khatri (Muhammad Faiz Fadzil, Kamarul Arifin Wafa & Mohd Irzan Iswatt Mohd Noor with him); M/s Kamarul Arifin Wafa & Assocs

For the respondent - Aston Paiva (Joanne Leong with him); M/s YH Teh & Quek

[Appeal from High Court, Seremban; Divorce Petition No: 33-57-12-2013]

Reported by Najib Tamby

A

JUDGMENT

Abdul Aziz Abdul Rahim JCA:

Introduction

[1] On 7 April 2014, the High Court of Seremban gave order in term of
B the respondent's petition in encl. 2 which order include *inter alia*, that the civil marriage between the appellant and the respondent be dissolved and *decree nisi* be made absolute with immediate effect. The respondent was also given the custody, care and control of the children with reasonable access given to the appellant on every Sunday from 9am until 6pm under the
C supervision of the respondent at the respondent's premises.

[2] This is the appellant/husband's appeal against part of that decision given by the High Court on 7 April 2014. In his notice of appeal dated 11 April 2014, the appellant appealed against the order giving custody, care and control of the children to the respondent as well as against the order
D giving access to the children at the respondent's premises on every Sunday from 9am to 6pm under the supervision of the respondent. The appellant also appealed against: (a) the order prohibiting the appellant, the appellant's family members or any third party having connection or relationship with the appellant from harassing the respondent, the children or any family
E members of the respondent at any time; (b) the order preventing the appellant or the appellant's family member or any third party having connection or relationship with the appellant from taking out the children from the respondent's premises or the premises of the respondent's parents or from the children school during school hours; (c) the order directing the appellant to
F pay a monthly maintenance of RM500 for the benefit of the two children and that the payment be credited directly into the respondent's personal bank account; (d) the order preventing the appellant from executing any instrument or document related to the children, and that such document should only be executed by the respondent. Finally, the appellant is also
G appealing against the award of cost of RM5,000 which is payable within 30 days from the date of the order.

[3] The issue in this case is whether the civil High Court at Seremban has jurisdiction to grant the custody order and later on 21 May 2014, upon a separate application by the respondent in encl. 37 before the High Court to
H grant the recovery order of the children against the appellant. The recovery order of 21 May 2014 is a subject matter of another appeal ie, Appeal No: N-02-1004-06-2014.

The Background Facts

[4] The respondent petitioned the High Court at Seremban *vide* an
I originating summons seeking *inter alia*, an order that her civil marriage to the appellant under the Law Reform (Marriage And Divorce) Act 1976 be

dissolved and also for the custody of the two children of the marriage namely Sharmila a/p Viran – female eight years old and Mitran a/l Viran – male five years old at the material time.

[5] The material facts of this case have been succinctly appraised by the learned High Court Judge in her written judgment. We shall not repeat them here except to refer to the facts where and when are necessary for the purpose of this appeal.

[6] One of the grounds for the divorce is that the appellant has embraced Islam and has become a Muslim convert. Following his conversion to Islam on or around 26 November 2012, the appellant also converted the two children to Islam purportedly without the knowledge and consent of the respondent. The respondent found out about this fact on 4 April 2013 when she went to Pusat Dakwah Islamiah in Paroi, Seremban for a verification on the conversion. The appellant also upon his and the children conversion to Islam had taken the children from their respective school and put them at Pusat Dakwah Islamiah Seremban.

[7] Then, on 15 May 2013 the appellant obtained the Syariah Court order dissolving the civil marriage between the appellant and the respondent, and on 26 August 2013 the appellant obtained a temporary custody order over the children from the Syariah Court which order was made final on 19 September 2013. The respondent was not informed of the proceedings for the orders of the Syariah Court.

Our Opinion

[8] We noted that the Syariah Court Seremban had granted the dissolution of the civil marriage between the appellant and the respondent pursuant to s. 46(2) of the Islamic Family Law (Negeri Sembilan) Enactment 2003 ("Enactment 2003") which reads:

> (1) …
>
> (2) The conversion to Islam by either party to a non-Muslim marriage shall not by itself operate to dissolve the marriage unless and until so confirmed by the Court.

[9] Our view is that, the Syariah Court has no jurisdiction to grant the dissolution of the civil marriage between the appellant and the respondent. One of our reasons for saying so is that s. 45 of the Enactment 2003 provides that Syariah Court can only grant orders pertaining to divorce or allows the pronouncement of the *talaq* by the husband where the marriage is registered or deem to be registered under the Enactment or that the marriage was solemnised in accordance to the Syariah law. The civil marriage between the appellant and respondent was neither solemnised in accordance with Syariah law nor registered under the Enactment. It was a marriage that was solemnised and registered under the Law Reform (Marriage and Divorce)

Act 1976. This issue also has been canvassed and decided by the Federal Court in the case of *Subashini Rajasingam v. Saravanan Thangathoray & Other Appeals* [2008] 2 CLJ 1.

[10] In that case, the learned Justice Abdul Aziz Mohamad FCJ held at paras. 141 and 144 that:

> [141] I can now conclude on the wife's first prong of argument on the issue of jurisdiction that the Syariah High Court has no jurisdiction under section 46 of the Administration Act to hear and determine actions relating to a non-Muslim marriage, which the marriage in this case is. It has therefore no subject-matter jurisdiction in this case under s. 46(2) of the Administration Act. The matter of the dispute between the parties in this case is therefore not a matter within the jurisdiction of the Syariah High Court. Clause (1A) of Art. 121, which denies to the secular courts jurisdiction in respect of 'any matter within the jurisdiction of the Syariah Courts', therefore does not operate to deny to the High Court jurisdiction in respect of the matter that is given by s. 51 of the Law Reform Act. This last conclusion about Clause (1A) prevails irrespective of the question of the effect on it of the finding that the Syariah Courts also have no personal jurisdiction in this case.

And

> [144] The question is whether s. 46(2) of the Family Law Act expressly provides otherwise. In my opinion it does not. It does not enable a Syariah Court to bring about a dissolution of a non-Muslim marriage where a party to it has converted to Islam. It is obvious from the very wording of the section that it is predicated on the supposition that in Islamic law the conversion of a party to Islam by itself may or does operate to dissolve the marriage. The section prevents that supposition from having a legal effect unless and until it is confirmed by the Syariah Court. What the Syariah Court does under the section is merely to confirm that the conversion has operated to dissolve the marriage. It is confirmation of the consequence on the marriage, according to Islamic law, of the act of one of the parties. The Syariah Court does not do anything under s. 46(2) to bring about dissolution of the marriage. It merely confirms that a dissolution has taken place by reason of conversion. I agree with the wife that s. 46(2) does not confer jurisdiction on the Syariah Courts to dissolve a non-Muslim marriage. In relation to that section, therefore, cl. (1A) of art. 121 does not apply to deprive the High Court of jurisdiction under s. 51 of the Law Reform Act.

[11] In *Subashini Rajasingam (supra)*, several questions were put to the Federal Court for determination. Two of the questions for determination in that case, that are relevant for our purpose are as follows:

> (2.1) In situations where one spouse in a marriage solemnised under the Law Reform (Marriage and Divorce) Act 1976 (a 'Law Reform Marriage') converts to Islam and the other does not, does the High Court or the Syariah Court have exclusive jurisdiction to grant

decrees of divorce of such Law Reform Marriages and to make all other orders in respect of the division of matrimonial assets, the maintenance of spouse and of the children of the Law Reform Marriage ('children of the Law Reform Marriage'), the custody, care and control of the children of the Law Reform Marriage and all other matters incidental thereto?

(2.2) …

(2.3) In the event, the answers to questions 2.2.1 and 2.2.2 are in the affirmative, is it an abuse of process for the converted spouse to file custody proceedings in the Syariah Courts in respect of the children of the Law Reform Marriage?

[12] The Federal Court answered both questions in the affirmative. We in the Court of Appeal is bound by the decision of the apex court on the doctrine of *stare decisis*. Therefore, the jurisdictional issue as to the jurisdiction of the Syariah Court to hear matters on the dissolution of civil marriage and any ancillary matters thereto can now be put to rest.

[13] However, in this appeal, though as we have found out that the Syariah Court has no jurisdiction to pronounce the dissolution of the civil marriage between the appellant and the respondent, the parties in the appeal before us are not questioning or challenging that decision. This is because we think that the parties are happy with the decision and had wanted the divorce all along.

[14] The principal challenge as to the jurisdiction in this appeal by the appellant is that the High Court does not have jurisdiction to grant the custody order of the children to the respondent and to give the other ancillary order as well.

[15] The main ground advanced by the appellant to support this contention is that the two children have converted to Islam before the filing of the petition and the conversion is valid under art. 12(4) and art. 8 of the Federal Constitution. Furthermore, it was argued that under s. 1(3) of the Guardianship of Infants Act 1961 (Act 351), the civil court is deprived to hear guardianship and custody matter when the subject matter and the parties are Muslims. Article 12(4) of the Federal Constitution reads:

(4) For the purposes of Clause (3) the religion of a person under the age of eighteen years shall be decided by his parent or guardian.

And cl. 3 of art. 12 reads:

(3) No person shall be required to receive instruction in or to take part in any ceremony or act of worship of a religion other than his own.

Section 1(3) of the Guardianship of Infants Act 1961 reads:

(3) Nothing in this Act shall apply in any State to persons professing the religion of Islam until this Act has been adopted by a law made by the Legislature of that State; and any such law may provide that:

A (a) nothing in this Act which is contrary to the religion of Islam or the custom of the Malays shall apply to any person under the age of eighteen years who professes the religion of Islam and whose father professes or professed at the date of his death that religion or, in the case of an illegitimate child, whose mother so professes or professed that religion; and

B (b) in the case of any other person, this Act, so far as they are contrary to the religion of Islam, shall cease to apply to such person upon his professing the religion of Islam, if at the date of such professing he has completed his age of eighteen years or, if not having completed such age, he professes the religion of Islam with C the consent of the person who under this Act is the guardian of the person of the infant.

[16] There is no evidence to show that the legislature of the State of Negeri Sembilan had passed any law to adopt the application of the Guardianship of Infants Act 1961. Therefore, the provisions of the Act do not apply to D Muslims in Negeri Sembilan.

[17] We find no merit in the above argument. In *Subashini (supra)* the child had also been converted to Islam at the time the High Court heard the application for custody. Yet, the Federal Court ruled that the High Court has the jurisdiction to hear the application and to grant the custody order.

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[18] We have perused the judgment of the learned High Court Judge and we could not find any discussion by the learned High Court Judge on the issue whether the court has jurisdiction to hear the custody issue as opposed to the issue of dissolution of civil marriage when the two children and their father ie, the appellant have been converted to Islam. In fairness to the F learned High Court Judge, Her Ladyship in an effort to justify that she has jurisdiction had referred to the case of *Shamala Sathiyaseelan v. Dr Jeyaganesh C Mogarajah* [2004] 1 CLJ 505; [2003] 6 MLJ 515, where the fact shows that the defendant in that case and the two children had embraced Islam before the originating summons in that case was filed. Before the High Court a G preliminary objection was raised by the defendant that the High Court no longer has jurisdiction over the defendant and the two children by reason of their conversion to Islam. However, the preliminary objection was dismissed by the High Court. The reason given by the High Court was that the validity of the marriage between the plaintiff and the defendant in that case was still H subjected to s. 8 of the Law Reform (Marriage and Divorce) Act 1976. And that the plaintiff's application there was related to the right of custody and welfare of the children and maintenance. The High Court opined that the plaintiff would not run away from her responsibility to support the children, and that the civil marriage still subsists until dissolve under any I circumstances under s. 8 of the Law Reform (Marriage and Divorce) Act 1976. And therefore, the defendant in that case was still subject to the jurisdiction of the High Court. The learned High Court Judge in this case

(the subject matter of the appeal) also referred to the Federal Court case of *Subashini Rajasingam (supra)* which held that "A non-Muslim marriage did not automatically dissolve upon one of the parties conversion to Islam. Thus, by contracting the civil marriage, the husband and wife were bound by the 1976 Act in respect of divorce and custody of the children of the marriage, and thus, the civil court continued to have jurisdiction over him, notwithstanding his conversion to Islam."

[19] The other argument raised by the appellant in this appeal is in relation to the position of Islam as the religion of the Federation under art. 3 of the Federal Constitution. The thrust of this argument is that since Islam is the religion of the Federation, art. 3(1) of the Federal Constitution imposes obligation upon the Federation to protect, defend, safeguard the Islamic religion, assist, enable and facilitate Muslims to practice Islam and give effect to or enforce Islamic injunctions spiritual and mundane. It was argued that by virtue of art. 3, Islam is one of the important basic structure of the Federal Constitution and therefore the full intent and purpose of Islam as the religion of Federation must be given real and practical effect, throughout. Citing the case of *Mamat Daud & Ors v. The Government of Malaysia* [1988] 1 CLJ 11; [1988] CLJ (Rep) 197; [1988] 1 MLJ 119, learned counsel for the appellant submitted that "based on this element of basic structure of the Federal Constitution, the Federal Government cannot directly or indirectly legislate on matters which the 'pith and substance' of it relates to Islam". It was thus argued by the appellant that the Guardianship of Infants Act 1961 (Act 351) and the Law Reform (Marriage and Divorce) Act 1976, clearly conform to the position that Acts of Parliament do not encroach into Islamic matters reserved exclusively, by the Federal Constitution, for the States, in incorporating exclusion clauses for those Acts of Parliament, not to apply to Muslims or to be in opposition to any Islamic/Syariah laws. It was submitted therefore that this court must give due regard and uphold the basic structure of the Federal Constitution by not usurping the jurisdiction of the Syariah Court reserved solely for the Syariah Court by the Federal Constitution. It was further argued, flowing from the above argument that, regardless of the contents of those phrases in para 1, List II, Ninth Schedule of the Federal Constitution and s. 61(3)(b) of the Administration of the Religion of Islam (Negeri Sembilan) Enactment 2003, which provide that the Syariah Court shall have civil jurisdiction to hear and determine all actions and proceedings if all the parties in the action or proceeding are Muslims, they will be to no avail to negate the jurisdiction of the Syariah Court in the subject matter of this case being the custody of Muslim children at the time of the dispute.

[20] Our understanding of this submission by learned counsel for the appellant which is that, reading s. 3(3) of the Law Reform (Marriage and Divorce) Act 1976 and together with s. 1(3) of the Guardianship of Infants Act 1961 in the context of art. 3 of the Federal Constitution that Islam being

A the religion of the Federation, the High Court cannot grant the custody order of the children to the respondent by relying on s. 51(2) of the Law Reform (Marriage and Divorce) Act 1976. This is because as submitted by learned counsel for the appellant, the court must give effect to the intent and purpose of putting Islam as the religion of the Federation under art. 3 of the B Constitution. Accordingly, learned counsel for the appellant urged upon us to rule that *Che Omar Che Soh v. PP [And Wan Jalil Wan Abdul Rahman & Anor] v. Public Prosecutor* [1988] 1 LNS 150; [1988] 2 MLJ 55, was no longer a good law because in that case having expressed the view correctly in defining the meaning of Islam or Islamic religion in not being "just a mere C collection or dogmas and rituals but it is a complete way of life covering fields of human activities, may they be private or public, legal, political, economic, social, cultural, moral or judicial", the Supreme Court in that case had restricted the meaning of Islam being a religion of the Federation under art. 3 of the Federal Constitution as to what was intended by the framers of the Constitution in that it is narrowly confine to the law of marriage, divorce D and inheritance only. The other reason for this submission advanced by the learned counsel for the appellant is that *Che Omar Che Soh (supra)* was a decision before the introduction of the art. 121(1A) of the Constitution and the decision in that case is not applicable for situation post art. 121(1A) of the Federal Constitution.

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[21] We must say that the learned counsel for the appellant had marshalled the above argument with great ingenuity. But, we have two short answers to the argument. Firstly, *Che Omar Che Soh (supra)* is a Supreme Court decision. It is binding on us being the Court of Appeal, a court inferior to the Supreme Court on the doctrine of *stare decisis*. We are in no position to overrule *Che* F *Omar Che Soh (supra)* being a Supreme Court decision. However, in a proper case we may distinguish the facts in *Che Omar Che Soh (supra)* and thereby not to apply the principle therein. But in the present appeal the appellant had not shown any reason or grounds for us not to follow *Che Omar Che Soh (supra)*. Secondly, the argument raised by the appellant in relation to art. 3(1) G of the Federal Constitution had also been discussed in *Subashini (supra)* with regard to the jurisdiction of the civil High Court under s. 3(1) and s. 51 of the Law Reform (Marriage and Divorce) Act 1976. In *Subashini (supra)* the husband who was the respondent before the Federal Court also argued that *Che Omar Che Soh (supra)* is no longer a good law because the Supreme Court H in that case make two grave errors, the same argument that was raised before us in this appeal. We will answer this argument by echoing the words of the learned Abdul Aziz Mohamad FCJ at para. 152 of His Lordship's judgment in *Subashini (supra)* which reads as follows:

> [152] The art 3(1) argument is also used to contend that Parliament had I no power to enact s. 51 of the Law Reform Act because it compels the application by the civil courts to a Muslim of the civil law in matrimonial cases. I am unable to see how the fact that Islam is the religion of the

> Federation prohibits Parliament from passing a law to ensure that where a spouse in a non-Muslim marriage converts to Islam and the marriage is consequently dissolved, he or she remains bound to the obligations under the legal regime governing a non-Muslim marriage, that he or she undertook to the other spouse, as regards himself or herself and the children of the marriage, when he or she entered into the non-Muslim marriage. I am unable to see how the fact that Islam is the religion of the Federation can operate to prevent a measure to ensure that the non-converting spouse is not frustrated in his or her expectations flowing from those obligations.

[22] We therefore find no merits in the argument by the learned counsel for the appellant.

[23] For the above reasons, we will dismiss the appeal with cost, and we order cost in the sum of RM10,000 to be paid by the appellant to the respondent. We also order that the deposit be refunded to the appellant.